

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

SIERRA CLUB,

Intervenor-Plaintiff,

v.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Hon. Bernard A. Friedman

Case No. 10-CV-13101

TELEPHONIC STATUS CONFERENCE

Detroit, Michigan - Friday, July 10, 2020

Appearances:

Michael B. Buschbacher
Thomas Benson
Kristin M. Furrie
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On behalf of Plaintiff

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On behalf of Defendant

- - -
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Appearances (continued):

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I N D E X

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Proceeding

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Telephonic Status Conference

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1 Detroit, Michigan

2 Friday, July 10, 2020

3 11:00 a.m.

4 - - -

5 (All parties appearing telephonically.)

6 THE COURT: Good morning. Judge Friedman on the
7 line. I understand we have some other folks on the line.
8 Let's start with the plaintiff. If I may have appearances.
9 Let's start with the plaintiff. Who do we have?

10 MR. BUSCHBACHER: You have the United States.
11 My name is Michael Buschbacher from the Justice Department,
12 and I have with me on the phone Tom Benson and Kristin
13 Furrie.

14 THE COURT: Okay. What's your name? One more
15 time.

16 MR. BUSCHBACHER: Sorry. Michael Buschbacher.

17 THE COURT: Okay. And you're going to be
18 speaking today, Michael?

19 MR. BUSCHBACHER: I'm sorry, what was that?

20 THE COURT: You'll be speaking?

21 MR. BUSCHBACHER: I will.

22 THE COURT: And are there other people on the
23 line from the plaintiff?

24 MR. BUSCHBACHER: Yes. Thomas Benson and
25 Kristin Furrie.

1 THE COURT: Okay. Tell me who's on for the
2 Sierra Club.

3 MR. FISK: Good morning, Your Honor. This is
4 Shannon Fisk on behalf of Sierra Club.

5 THE COURT: We have everybody for the
6 intervenors as well as for the plaintiff.

7 Okay. So tell me who is here for the defense.

8 MR. BROWNELL: For the defense, Your Honor,
9 William Brownell on behalf of DTE, and I am joined on the
10 phone by Keith Johnson and Michael Solo.

11 THE COURT: Okay. And our court reporter for
12 today, is it Suzanne?

13 COURT REPORTER: Yes, Judge, it's Suzanne.

14 THE COURT: When you speak, some of the voices I
15 recognize because I've been doing this case for so long, but
16 Suzanne has not. But when you speak, just say your name so
17 she knows who you are.

18 Johnetta, are you on the phone?

19 THE CLERK: Yes, Judge.

20 THE COURT: Okay. Johnetta is my case manager.
21 And Eva, are you on the phone?

22 LAW CLERK: Yes, Judge. Good morning.

23 THE COURT: Good morning. And Steve, are you
24 there?

25 LAW CLERK: Yes, I'm here, Judge.

1 THE COURT: So we know who is all on the phone.

2 We have some matters up today, and I have spent
3 a lot of time going over everything. I put it on the back
4 shelf because I thought it was resolved by paperwork. I'm
5 going to maybe start, I'll just put it on the record where I
6 think we are, and then we'll go to each party, and please
7 tell me if I'm right, wrong, what's left.

8 As to the original case, my understanding as to
9 that case is that the United States has lodged a consent
10 decree, and that the process of that consent decree is
11 starting in terms of the statutory and administrative
12 (indiscernible) done, (indiscernible) complete assume that
13 at that point by the Court that part of the case.

14 COURT REPORTER: Excuse me.

15 THE COURT: Next part, my understanding again is
16 that the intervening parties as well as the defendant have
17 also entered into a separate agreement and the Sierra Club
18 has filed a motion, and there's no response to that motion
19 yet but we do have (indiscernible) --

20 COURT REPORTER: Excuse me, Judge.

21 (Phone connection cutting out.)

22 THE COURT: -- that will accomplish
23 (indiscernible) resolve one of two things. Number one, that
24 it will overrule that (indiscernible) a private matter.
25 That's the issue if (indiscernible) all in agreement, the

1 question is only whether (indiscernible) and the difference
2 is that in terms of the (indiscernible) on the defendant by
3 that file --

4 COURT REPORTER: Judge...

5 THE COURT: -- and wait for the response and the
6 (indiscernible) to file a large brief and (indiscernible)
7 with that. The Court will grant that motion, there has been
8 an order filed. The Court will sign that order so that now
9 what we have is completion of (indiscernible) by the
10 government and the defendant (indiscernible).

11 (Phone connection cutting out.)

12 COURT REPORTER: Excuse me, Judge. Excuse me,
13 Judge.

14 THE COURT: Yes?

15 COURT REPORTER: I can only hear every other
16 word. Your phone is cutting out.

17 THE COURT: Oh, I'm sorry. Okay. Maybe I'm not
18 close enough to the phone. I bought this new phone system
19 for home.

20 Okay. The other thing we're briefing now, and
21 what the Court has to decide, has to do with the other side
22 when the response comes in is the (indiscernible) between
23 DTE and the (indiscernible).

24 So I think I'll hear from the plaintiffs first.
25 That's where we stand. Do you have anything to add to that?

1 MR. BUSCHBACHER: Yes, Your Honor. This is
2 Michael Buschbacher for the United States. Just one
3 correction from us. We did actually file our response
4 early. We wanted to give you an opportunity to see that
5 before today's hearing, so we filed that on Wednesday, and
6 we just brought out the red pens and got it to fit within
7 25 pages, so that should be on file now with the Court.

8 THE COURT: I didn't go to the CM/ECF to check
9 anything. I have everything here, but that's great. I have
10 not seen it.

11 MR. BUSCHBACHER: And the only other thing I
12 would say is that these things are -- the two things are
13 connected in some respect, the government consent decree and
14 the side agreement. There is a provision in the
15 government's three party consent decree that sets forth kind
16 of the procedures that we agreed to in negotiating Sierra
17 Club and DTE for how they would submit their side agreement
18 to the Court for review.

19 THE COURT: However, you have consented to that
20 agreement, have you not, the side agreement?

21 MR. BUSCHBACHER: No, we have not consented to
22 it. Our consent decree that we lodged with the Court
23 indicates that we were reserving the right to object to it.
24 After looking at their request, at their motion to enter, we
25 went through extensive internal review, it went up to the

1 number two official at the Department of Justice, and we
2 concluded that we did indeed want to file an objection. So
3 our response would take issue with the procedural requests
4 made in the side agreement, and also takes issue with the
5 substance of what Sierra Club was trying to attain.

6 THE COURT: Okay. Now, that is what's
7 outstanding at this time. So the Court has to decide that
8 issue, and once I decide that issue, whether -- whichever
9 way I go, that would resolve the litigation between Sierra
10 and DTE.

11 MR. BUSCHBACHER: Yes, Your Honor. The way that
12 agreement works, and I'm sure Shannon can speak to this, as
13 well, if their agreement is entered or otherwise approved
14 without entering it, that agreement includes a release that
15 kicks in once the three party CD is approved. If it's not
16 approved by the Court, Sierra Club and DTE have agreed to
17 file a stipulation to dismiss Sierra Club's amended
18 complaint.

19 THE COURT: Okay.

20 MR. BUSCHBACHER: So one way or the other, it
21 will go away.

22 THE COURT: Okay. I notice one of the pleadings
23 was 800 some-odd pages. I've never --

24 MR. BUSCHBACHER: That's largely comments, Your
25 Honor, on the three party consent decree. We have also

1 included a nice little summary that covers all the unique
2 aspects of those in 14 crisp pages.

3 THE COURT: I understand. As I said, I kind of
4 put it on the back burner, and the last couple days I've
5 been kind of working on it somewhat.

6 How about DTE, anything you want to add?

7 MR. BROWNELL: Yes, Your Honor. This is William
8 Brownell. I was going to suggest the Sierra Club should go
9 first, and then I can address both what Sierra Club and the
10 government have to say.

11 THE COURT: Sierra Club.

12 MR. FISK: Yes, Your Honor. Shannon Fisk for
13 Sierra Club. Yes, I believe your summary was accurate
14 overall. Just a couple points of clarification.

15 The first, just the main contested thing is
16 between all three parties, Sierra Club did sign that consent
17 decree. The second, on the separate agreement, yes, so we
18 have filed a separate agreement. We had originally proposed
19 to include those terms within the main consent decree. The
20 Department of Justice decided it wouldn't go that route.
21 And then we were fine, Sierra Club was fine not filing the
22 separate agreement with the Court (indiscernible) separate
23 agreement. But pursuant to the main consent decree, we are
24 required to by DOJ.

25 And so, you know, you now have our motion

1 regarding the separate agreement to either interpret or to
2 simply take notice of it, depending on whether you find it's
3 a private settlement agreement or not, and then the
4 government has filed their response. Our reply is due
5 August 3rd, and we intend to file it by that date. And
6 then I would simply note that also, you know, the
7 (indiscernible) on the separate agreement will obviously
8 take care of this case. But DTE can speak to this more, but
9 as they noted, they intend to file a separate agreement, you
10 know, regardless of the outcome here, so those commitments
11 will occur. And so, you know, I think, you know, it's not
12 clear why the Court would need to rule on the separate
13 agreement.

14 THE COURT: But I have to because there's a
15 motion. I understand what you're saying as a practical
16 matter, but (indiscernible).

17 COURT REPORTER: Judge, I can't hear you.

18 THE COURT: I'm sorry. I had the phone pushed
19 over a little bit. I'm going to have to figure it out
20 because it's a brand new phone system, and it should be
21 working great.

22 So as a practical matter, I'm not sure that it
23 will make any difference, but I have to decide it.

24 Okay. DTE.

25 MR. BROWNELL: Your Honor, this is William

1 Brownell for DTE.

2 From DTE's standpoint, the primary objective is
3 to resolve the action and put it behind the company as soon
4 as possible. DTE has, therefore, agreed with the government
5 and with Sierra Club regarding what they would do to resolve
6 the case and as to the specifics, and DTE plans to proceed
7 with these agreed-to actions regardless of whatever form the
8 final agreements take.

9 But in DTE's view, at this point, all parties
10 have agreed to resolve the claims of the case and to
11 dismissal of the case with prejudice. This would resolve
12 the case, so in our view, the main CD with the government
13 should be entered and the case should be dismissed with
14 prejudice as soon as possible.

15 I recognize that you have to decide what happens
16 with the separate agreement, but we see that as a separate
17 issue and should not affect the entry of the main consent
18 decree and dismissal of the case.

19 THE COURT: Well, I think the main consent
20 decree has to be entered, and then we have to start doing
21 the process. I thought we entered it, but if we hadn't
22 entered it, there's no reason not to.

23 MR. BUSCHBACHER: Your Honor, Michael
24 Buschbacher for the United States, if I may.

25 THE COURT: Yes.

1 MR. BUSCHBACHER: We do not think that dismissal
2 is appropriate. We think two things should be considered
3 together.

4 THE COURT: I don't suggest dismissal at this
5 point. I think enter that agreement and get it going, and
6 then when I decide the issue of the Sierra Club, whether to
7 (indiscernible) or not, then through that order, either way
8 I go, then I guess it really depends. If I make it private,
9 then there's no reason to, based upon the consent judgment,
10 not to dismiss it because I can retain jurisdiction for
11 purposes of forcing the consent decree. But if there is --
12 the Sierra Club is involved and that one is not private then
13 I'm going to have to take a look at that, too, because
14 there's a question of enforcement. However, DTE has just
15 told us they're going to do it no matter what, so at that
16 point we'll take a look at it, but I think it's fine.

17 MR. BUSCHBACHER: Your Honor, we don't think so.
18 The issue here is whether -- it's about whether the federal
19 government is in charge of deciding what quantitative relief
20 is appropriate.

21 THE COURT: You're right. I mean, I don't want
22 to make a decision, but -- I have no idea, so let's wait and
23 see what happens.

24 MR. FISK: Your Honor, just real quick. Shannon
25 Fisk again.

1 I mean, we agreed that the issue would probably
2 be moot given that DTE has committed to do these
3 (indiscernible). But I'd also note that this agreement does
4 not seek federal court jurisdiction or enforcement over the
5 agreement. Would not have to, you would not have to try to
6 make that happen under the separate agreement because it's
7 not sought in the agreement itself.

8 THE COURT: Okay. I don't know enough about it,
9 but I think the main consent agreement should be entered if
10 it hasn't, and then I will now wait for the reply, and when
11 we get the reply, we'll get on top of it right away and
12 we'll get that out. And then once I decide that issue, then
13 we can have one more conference, rather than briefing it and
14 so forth, and talk about dismissal, non dismissal,
15 enforcement, you know, things of that nature. We'll decide
16 the motion as quickly as we can.

17 MR. BROWNELL: Your Honor, this is William
18 Brownell. Just to make a point about the Sierra Club
19 intervention, Sierra Club has agreed in the main CD with the
20 government, which Sierra Club has signed, as well. Sierra
21 Club has agreed to that main consent decree, and they've
22 also indicated in that consent decree that if you decide not
23 to enter the separate agreement they will stipulate to
24 dismissal of the case in any event.

25 THE COURT: So we're home free. Hold on, my

1 cell phone is ringing.

2 (Brief pause.)

3 THE COURT: Anyhow, let me decide the motion,
4 and then we'll decide how we'll handle it.

5 MR. BUSCHBACHER: Your Honor, Michael
6 Buschbacher again. That sounds fine to us.

7 I think when you read our brief you'll see the
8 main concern we have is about circumventing the government's
9 role as the lead environmental enforcer, and so that ties
10 into all these matters about whether they can do it anyway,
11 and all those sorts of things. So I just wanted to clarify
12 that point. But we are okay so long as the Court is going
13 to consider our objection.

14 THE COURT: Oh, absolutely. Again, I'll
15 consider everything I have before me. I'll wait for the
16 reply, and, as soon as I get the reply, we'll start working
17 on it right away, we'll get you an opinion. And then I'll
18 know it better. You know, I haven't read everything, I've
19 read mainly your introduction, but I will start now. We're
20 home for the duration, so I have lots of time.

21 MR. BROWNELL: Your Honor, Bill Brownell again.

22 Just as a final observation. I just wanted to
23 confirm that regardless of whether you enter the decree or
24 not, if you don't enter the decree, we'd be fine to continue
25 to work with us to benefit the local community even after

1 the case to dismissed with prejudice. I just wanted to be
2 clear on that.

3 THE COURT: Good, I think that's good.

4 Anything else that we should be talking about?

5 MR. BUSCHBACHER: Your Honor, I just want to
6 make sure, but the motion for the page limit on reply, was
7 that granted?

8 THE COURT: Granted I'll sign that order.

9 UNIDENTIFIED SPEAKER: Okay. Thank you, Your
10 Honor.

11 THE COURT: Okay. Stay healthy, stay cautious.

12 (Proceedings concluded at 11:21 a.m.)
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C E R T I F I C A T I O N

I, Suzanne Jacques, Official Court Reporter for the United States District Court, Eastern District of Michigan, Southern Division, hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date set forth.

s/Suzanne Jacques
Suzanne Jacques, RPR, RMR, CRR, FCRR
Official Court Reporter
Eastern District of Michigan

7/28/2020
Date

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